IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 48

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Petitioner;

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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STATUTES AND AUTHORITIES

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Interest of Amicus

The American Civil Liberties Union, appearing herein with the consent of both parties filed with the Clerk of this Court, is a nationwide nonpartisan organization devoted solely to the protection and advancement of the Constitutional rights fundamental to the democratic way of life. It has no other program, either political, economic, social, or philosophical.

Amicus' primary concern with the instant case is that this Court's validation of the order here involved would cause a contraction in freedom to exchange political opinions in America, particularly on international issues, and a loss in the cognate freedom to associate for the purpose of political expression. The instant order and statute not only would establish a precedent lessening the protection of the First Amendment guarantee for all Americans, but would, here and now, spread a restraint far beyond petitioner and its members, over the rights of expression and association of Americans generally.

The case now before this Court has, to amicus, an enhanced importance because it believes there has been a widespread disregard of First Amendment principles in Governmental practices in the past few years, which has for one reason or another escaped judicial scrutiny. Judicial guidance back to First Amendment principles by invalidation of the instant order would be most opportune and salutary; it would help revive the traditions and patterns of free thought, free expression, and free association which in day by day practice are being transformed and corrupted from their constitutionally-intended design.

Amicus recognizes that the Communist Party, petitioner herein, has a dual nature, engaging publicly in the forms of expression and association usual to political parties and organizations, but also engaging covertly in anti-democratic methods in aid of the aims of Soviet Russia, to the extent even, it appears, of securing the commission of espionage against the United States. Amicus, believing the Government must take vigorous measures against the latter type of activities, is of course concerned solely with protection of the rights of petitioner in the first role, because of the effect of restraints in this area on principles and practices affecting freedom of expression and association for all Americans.

Amicus is also fully aware that private groups and individuals may, in their exercise of their freedom of ex-

pression and association, find it advisable privately to adopt restrictions against petitioner and its members. Indeed, amicus has since 1940 barred from all positions in its organization persons who are members or accept the discipline of the Communist Party. However, amicus emphasizes, particularly in connection with the instant case, that preservation of a distinction between the Government's sphere and the individual's is one of the essential points of difference between democracy and totalitarianism. What we are here seeking to maintain is the right of the individual to come to his own independent determinations in the field of opinion and political association, free from Government direction and control.

Statement of the Case

The facts, proceedings, and statutes here involved are set forth in detail in the briefs of the parties. Here they will be briefly summarized so far as relevant to the instant argument.

The Statute

The Subversive Activities Control Act of 1950 [1] provides for the establishment of the Subversive Activities Control Board (hereinafter called SACB) with the duty of determining, upon petition of the Attorney General of the United States, whether an organization is a "Communist-action organization" as defined in the Act (Section 13). A "Communist-action organization" is defined as "any organization in the United States * * * which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title." (Section 3(3)(a).)

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[1] 64 Stat. 987, 50 U. S. C. 781 ff., hereinafter termed The Act.

The "world Communist movement", on which the above definition hinges, is described at length in section 2. In its most important passages section 2 states:

> (1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.
>
> (2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality
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> • • •
>
> (5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.
>
> (6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most power-

ful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves * * *.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement * * *.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

"In determining whether any organization is a 'Communist-action organization'," as defined in Section 13, with reference back to Section 2, the Board is directed to "take into consideration" among other things, and did in the instant case place major emphasis on, "the extent to which its views and policies do not deviate from those of such foreign government (Russia)" (Section 13(e)(2)).

An organization found to be a "Communist-action organization" by SACB must register, in registers "kept and maintained in such manner as to be open for public inspection" (Section 9(b)), the names and addresses of all officers and members during the preceding year, the sources of all moneys received and the purposes for which expended, and a list of printing presses and similar machines in which the organization has an interest (Section 7).

Further, the Act provides that any publication disseminated by the organization through the mails or any instru-

mentality of interstate or foreign commerce, must bear on its wrapper as well as its text the notation "Disseminated by _____, a Communist organization", and all broadcasts are to be preceded by the announcement: "The following program is sponsored by _____, a Communist organization", with the name of the organization in place of the blank (Section 10).

The Act also has a provision on tax deductions and exemptions for an organization found to be a "Communist-action organization" (Section 11); and it imposes specific disabilities on its members with respect to employment in the Government or defense facilities (Section 5); passports (Section 6); and if they are aliens, exclusion, deportation, naturalization and denaturalization (Sections 22, 25).

Proceedings

Upon the Attorney General's filing of a petition with the SACB on September 23, 1950 (R. 143), a SACB panel commenced hearings on April 23, 1951 to determine whether the Communist Party of the United States was a "Communist-action organization" (R. 1). On April 20, 1953 SACB issued its order requiring petitioner to register as a "Communist-action organization", accompanied by its findings and opinion, as required by Section 13(g) of the Act (R. 138, 1). Pursuant to Section 14 of the Act, the Communist Party petitioned the United States Court of Appeals for the District of Columbia to set aside the SACB order (R. 2078). On December 23, 1954 that Court entered its opinion and judgment approving the SACB order against petitioner (R. 2078); and this Court, pursuant to Section 14(a) of the Act and 28 U. S. Code 2154, granted the petitioner's petition for a writ of certiorari to review that judgment and opinion.

Question to Be Argued

Because amicus believes that the most far-reaching effects from the civil liberties standpoint, of validation of the instant order would be experienced in the First Amendment area of freedom of thought, expression, and association, this brief will be devoted exclusively to the argument that the registration order against petitioner, and the provision of the Act for registration of "Communist-action organizations" as here interpreted, violate the First Amendment to the Constitution.

Summary of Argument

A. While force and violence has been found to be the covert and ultimate pattern of the Communist Party, it must be borne in mind that the Party's contact with the public is as a political organization expressing non-revolutionary and non-violent opinions on the social and political issues of the day.

The registration requirement now before the Court is unprecedented in purpose and effect relative to previous legislation dealing with the Communist Party, which had restrained either harmful acts or advocacy of forceful overthrow of the government. In contrast, as the legislative history of the instant statute unmistakably shows, the registration requirement is primarily intended to affect petitioner and its members in their public political functioning, restricting them in their expression of the non-revolutionary opinions on everyday political issues which they customarily address to the public, and in their associations for the purpose of such expression.

The Government's public stigmatization, through the registration order, of petitioner and its members as traitor-

ous, obviously would deter and discourage people outside the Communist Party from giving consideration or even a hearing to their views notwithstanding the non-violent character of the opinions disseminated to the public. Thus, the registration order diminishes a crucial component of the First Amendment right to expression: the right to address listeners, so far as they are willing, without Government control or interference. The governmental stigmatization would also affect the First Amendment rights of petitioner, its members, and the public generally, by discouraging any association in or with the Communist Party, and thus also of expression through it; and again, the impact would be primarily in the area of association for the purpose of expressing non-revolutionary, political opinions. For the people influenced by the Government stamp of treason on the organization and its members would tend to be those who might, without this Governmental intervention, be interested in the peacable political opinions expressed by the Party and its members; persons in sympathy with violent overthrow of the Government or overtly pro-Soviet aims would hardly be influenced against the Party or its members by the "Communist-action" designation.

B. The decisions of this Court realistically recognize that Governmental imposition of a stigma is an exertion of Governmental force and coercion, and that such an exercise of Government power must meet the tests of the First Amendment. The fact that the opprobrious designation may be true does not make it any the less a Governmental restraint within the purview of the First Amendment.

C. The Government's burdening and restricting the freedom to associate and to express opinions, though the opinions do not in themselves create a danger, is contrary to fundamental First Amendment principle. This Court emphasized in *DeJonge* v. *Oregon*, 299 U. S. 353, that freedom of expression depends for its preservation on the principle that the Government has power to control expression only

if its content is outside the bounds of speech protected by the Constitution. The salient consideration in Governmental restriction of expression is the content, not the source. The rationale of the registration requirement here at issue is in direct contradiction to the *DeJonge* precept, for it is intended to and does diminish the right of expression and association of a Communist regardless of his subject, and in particular negates his freedom of expression through discouraging consideration or even a hearing of any of his opinions. This subversion of the *DeJonge* doctrine has a large significance because it means a rejection of our basic Constitutional tenet that truth will be sifted from error by a free debate of ideas. Instead of confidence in the free exchange of ideas as the way to truth, this Act assumes that exposure to error is likely to be fatal to the discovery of truth and that the American public cannot, without Government identification of the false prophets, determine whether ideas are false or true.

D. The provisions of section 10 of the Act for the labeling of petitioner's publications and their wrappers with a label reflecting the SACB findings as to its opprobrious nature, and for a similar announcement prior to any broadcast by petitioner, further effectuate the purpose of attaching a public stigma to petitioner's expressions of nonrevolutionary opinion on everyday political topics; it is these topics with which its publications and broadcasts deal. The label and announcement thus imposed by governmental edict, are intended to and would cause petitioner's literature and broadcasts to be shunned, on the basis of their source and regardless of their content, and thus contrary to First Amendment principle.

E. Besides impinging on First Amendment rights by imposition of a public stigma that particularly affects peaceable political expression and association, the registration order also restrains freedom of expression by reason of the basis on which it was made. For "one of the chief items

of evidence in the case," according to the Court below (R. 2148), was the evidence of petitioner's expression of non-violent non-revolutionary opinions on international issues that were similar to opinions expressed by Soviet Russia. The source of the similarity of views was held irrelevant, or even whether the petitioner's views were adopted before or after adoption of a similar view by Russia.

Imposition of the stigma and penalties of the Act in large part on the basis of a mere coincidence of views on current political questions with those of Soviet Russia, would clearly tend to influence all organizations in this country to limit their expression of views that do or might coincide with Russia's. Furthermore, independent, individual expression on current international questions would be similarly restrained, for, as a result of this order and the definition of membership, expression of views akin to those of Russia would subject an individual to the risk of being held a member of petitioner. Many of these views are not uniquely the product of Communism, and might be regarded as meritorious on non-Communist premises. Thus, by indicating that views coinciding with Russia's are forbidden territory, this order tends to seriously impede the free expression and free scrutiny of ideas by non-Communists with respect to crucial international issues.

F. In its effect on freedom of political expression, the instant registration requirement is markedly dissimilar from all previous registration statutes. Thus, the foreign agent's registration statute applies to representatives of friendly and esteemed governments no less than the hostile or disfavored, and the lobbyists' registration is required of the most respected groups along with the less reputable. Any stigma attaching to the registrant would arise from the circumstances, not from deliberate Governmental selection and designation. And any reflection attaching to a registrant under those acts could hardly compare with the odium arising from the instant order, for the very reason that those registration systems did not include a procedure

for findings by which the Government would deliberately set about creating a stigma. The purpose and effect of registration as a "Communist-action organization" or its member, and thus as an organization or person treacherously destroying our government, is virtually to close the marketplace of opinion to expressions by the organization and its members; on the other hand, the effect of registration as a lobbyist or foreign agent is, in general, to leave unimpaired the communication of their opinions, and merely circulate in addition information as to the source of the opinions to aid in their evaluation.

G. The purported justification for the restraints imposed by the registration requirement on non-revolutionary political expression and association appears to be that through such peaceful expression and association petitioner may lead people to engage in subversive acts of violence against the Government, sabotage, or espionage. Thus, this measure does not restrain incitement to violence, nor is it even advocacy of violence that is being restrained. Rather, it cuts off expression and association that merely *may* lead to endorsement of violence which in turn *may* lead to action—an area of expression so far back in the continuity leading to the possibility of violence that it has heretofore been given absolute protection. This Act takes the unprecedented position that the total right to political expression and association can be controlled and crippled merely because one phase of a persons's or organization's activity is found to be dangerous.

Such an unprecedented reaching-back into the area of peaceable expression and association would be permissible only if the Goverment could show a danger of violence, espionage or sabotage so great and threatening that ordinary measures could not be trusted and usual respect for First Amendment rights could not be accorded. No such threat has been shown; nor has there been any demonstration that narrower and more direct means, operating nearer the point of danger are inadequate.

The lower court's view that the order might be justified as a means of averting the danger of foreign control or foreign interference with our governmental processes, entirely ignores the extent of petitioner's political strength and influence, which is so insubstantial as to make this danger chimerical.

H. The constitutional infirmity of the registration order under the First Amendment inheres in the statutory provision under which the order was issued, and renders the provision for the registration of "Communist-action organizations" and all the statutory provisions dependent thereon invalid.

ARGUMENT

The registration order against petitioner, and the statutory provision for registration as here interpreted, violate the First Amendment to the Constitution.

A. The purpose and effect of the registration order is to impose a restraint on the First Amendment rights of petitioner and its members to engage in peaceful expression of non-revolutionary opinions and in association for the purpose of such expression.

1. The Peaceful Non-violent Phase of Petitioner's Activity.

To understand the purpose and effect of the registration provision, it is necessary to have in mind one of the basic facts Congress had in contemplation in enacting it: that the Communist Party's contact with the public is as a political organization expressing non-revolutionary and non-violent opinions on the issues of the day. While force and violence has been judicially found to be its covert and ultimate pattern, this aspect of its program does not enter into the views it presents to the public when it supports candidates for election, takes a position on legislation, holds public meetings, circulates petitions or engages in other of its propaganda activities. Indeed, the actual extent to which a belief in overthrow of the government by force and violence has taken hold even in the convictions of the rank-and-file of the membership has not been established by the Report of the Subversive Activities Control Board here in issue, or otherwise. Cf. *Galvan* v. *Press*, 347 U. S. 522, 526-528.

That the Party acts in its public appearances "as a political organization" is a matter of common knowledge, recognized in the decisions of this Court (*American Communications Ass'n* v. *Douds*, 339 U. S. 382, 404). As Mr. Justice Jackson said in a more detailed analysis: "(T)hose Communist Party activities visible to the public closely re-

semble those of any other party * * *. There are, however, contradictions between what meets the eye and what is covertly done * * *" (*ibid*, at p. 423; Jackson, J. concurring and dissenting, each in part).[2]

Regardless of what is being covertly done, it appears that the last years in which the Communist Party in this country made any open or direct declaration relative to force, violence, or overthrow of the government was 1934 or 1935 (Court of Appeals Opinion, R. 2140-2141). Instead, its public expressions relate to the various social and political issues of the day, such as labor relations, race discrimination, and most notably and most emphasized by the Court below, international affairs, such as relations with China, war in Korea, or control of atomic weapons (R. 2145-2146; see SACB Report, R. 82-84).

2. Purpose and Effect of Registration in Relation to First Amendment Rights.

It is clear from the Congressional reports and debates on this Act, and we do not believe it can be controverted, that the primary purpose of the registration provision was to curtail and restrict the effectiveness of petitioner and its members when they seek to express themselves on these everyday non-revolutionary political issues, and attempt to associate for the purpose of such expression. No previous legislation had been so designed; previously only harmful acts or advocacy of forceful overthrow of the government had been restrained. See *Douds*, 339 U. S. at p. 404; and *Dennis* v. *United States*, 341 U. S. 494, 502, where

[2] The Party's public role as an organ for the expression of non-violent political opinion has been recognized over a period of years. See *Schneiderman* v. *United States*, 320 U. S. 118, 157; *Ex parte Fierstein*, 41 F. 2d 53 (C. A. 9th, 1930); *Strecker* v. *Kessler*, 95 F. 2d 976 (C. A. 5th, 1938), aff'd on other grounds, 307 U. S. 22; Ward, Communist Party and The Ballot, 1 (1941) Bill of Rights Review (publication of the American Bar Association), 286; Note, 52 (1942) Yale Law Journal 108, 128. See SACB Report as to petitioner's role as a "domestic political party," R. 132.

this Court pointed out that in the legislation there in issue "Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction".

(a) *Legislative History*

The Senate Report on the bill which became the instant Act pointed out: "The purpose of registration is— (a) to expose the Communist movement and protect the public against innocent and unwitting collaboration with it * * *",[3] and "The proposed bill represents * * * a registration statute calculated to effect disclosure of the identity and propaganda of individual Communists and Communist organizations."[4] Besides making clear that the registration requirement was designed primarily for its effect on the public and on Communist propaganda, the Report also makes clear that the propaganda the draftsman had in mind was those opinions on everyday political issues on which the Party customarily addressed the public. For the Report points out, in justification for the Act's purpose of exposure, that "the present line of the Party * * * is to avoid wherever possible the open advocacy of violence"[5] Illustrating the intended effect of registration on the public and its purpose of impeding the expression of non-revolutionary political opinion and peaceful political association by Communists, Senator Ferguson, who submitted the Senate Report, pointed out on the floor that genuine liberals should appreciate the registration provision because it

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[3] Senate Report No. 1358, 81st Cong., 2nd Sess., on S. 2311, p. 3. The other purpose of registration is stated as "(b) to expose, and protect the public against, certain acts which are declared unlawful." The Report then specifies the acts made unlawful by the statute, such as the communication of defense secrets.

[4] *Ibid*, p. 7.

[5] *Ibid*.

would help them prevent Communist infiltration of their organizations.[6]

(b) *Effect of Registration.*

That the major purpose of the registration provision is to impede peaceable association and exchange of opinion by and with Communists, is indeed evident from the nature of the requirement. Though section 2 of the Act speaks of secret acts of espionage and sabotage as characteristic of the world Communist movement, this Government's informing the public that the Communist Party is a "Communist-action organization" as defined in the Act, and of the identity of its officers, members, and contributors, is obviously not calculated to prevent these surreptitious criminal acts. Nor is such public exposure and opprobrious designation intended for the use of government officials in denying Communists employment or subjecting them to other restraints,[7] nor will it help the FBI in surveillance of those members or helpers who are engaged in covert and dangerous activity.

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[6] 96 Cong. Rec. 14535. See also Senator Ferguson's statement that the purpose of registration is "to protect the public at large against innocent collaboration with communism and against its treachery * * *. No longer can there be dupes"; and his repeated explanations that the purpose was disclosure to the public (*Ibid.* and 96 Cong. Rec. 14439-14440). See statement of Senator Mundt, another draftsman of the Act (see 96 Cong. Rec. 14575) and the Act "will alert Americans to the fact that Communist propaganda is spewed out to them from Communist sources" (96 Cong. Rec. 14598) and that the American people will be "alerted" to the danger from Communists by the Act itself, even before issuance of a SACB order: 96 Cong. Rec. 14497. See also statement of Senator Holland, one of the active proponents of the Act, as to the purpose of exposing the identity of Communists to the public: 96 Cong. Rec. 14491-14492.

[7] It is evident that the registration is in no way essential for the operation of the other sections of the Act; indeed, as petitioner has pointed out and as was pointed out in the Presidential veto, the limitations imposed on the Party with respect to tax exemption, and its members with respect to employment, etc., by the other sections of the Act, were already in effect before its passage.

The major effect of the registration device would be the intended effect: imposing a restraint on peaceable expression on everyday political topics by petitioner and its members, and on peaceable association for such expression. Indeed, stigmatization of petitioner as a "Communist-action organization" and of its members would tend to exclusively affect this area of expression and association. For persons in sympathy with violent overthrow of the government or overtly pro-Soviet aims would hardly be influenced against the Party or its members by the "Communist-action" designation; people who would be influenced by the Government stamp of treason on the organization and its members would tend to be those who would in its absence be attracted or influenced by the Communists' expressions of opinion on everyday political topics.

The rights of peaceable expression and association would suffer the impact of the Governmentally-imposed stigma from a number of directions. The petitioner's right to gain adherents for the expression of political opinions, and of those who are members to have likeminded persons join with them for such expression, would obviously be affected by the fact that the members as well as the organization would be subjected to the stigmatizing registration; and conversely, this penalty on membership would curtail and restrain the freedom of any persons to associate in the Communist Party and through it to express themselves on the numerous political issues with which the Party deals.[8] Again, the stigma affects the right of the Communist Party and its members to address the public on such political issues, by deterring and discouraging people from giving them an audience or responding to their views; and conversely it curtails the freedom of non-members to hear and

[8] Once it is established that the First Amendment rights of one of the parties before the Court are affected, it is appropriate for this Court to consider the full effect of the Act in appraising whether it it a reasonable limitation on First Amendment freedom. See, i.e., *Bridges* v. *California*, 314 U. S. 252, 268; *Schneider* v. *State*, 308 U. S. 147, 161.

consider petitioner's and its members' views, through fear of associating with or responding to Government-stigmatized persons and thus likewise themselves running the danger of Government disapprobation. The restraint bears down on a crucial aspect of First Amendment rights when it interferes with the public's willingness to hear and consider the views of petitioner and its members; for "the right of free speech is guaranteed every citizen that he may reach the minds of willing listeners."[9] Here the "channels of communication"[10] are blocked off by a weapon perhaps as effective as physical interference.

It may be granted that the registration order will to some extent affect the functioning of the Party and its members in all respects. However, considering that the effect of registration on everyday peaceful political expression and association is not incidental or accidental, but rather a major legislative purpose; that the direct and immediate and most pronounced impact of registration will be in that sphere; and the established doctrine that particularly in a measure affecting First Amendment rights its entire reach must be considered in determining its constitutionality,[11] — for all these reasons, the registration requirement must be tested for constitutionality as a measure affecting the rights of peaceful political expression and association.

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[9] *Kovacs* v. *Cooper*, 336 U. S. 79, 87.

[10] *Saia* v. *New York*, 334 U. S. 558, 560. In that the effect of the registration provision is to limit the audience for the views of petitioner and its members, the restraint is similar in operation to the more conventional type of restriction heretofore imposed on free expression. See, i.e., *Saia*, where the interference with the right of free speech took the form of limiting the audience through limiting the use of loudspeakers; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290: limiting the possibility of an audience by limiting the place of meeting.

[11] See cases cited supra note 8; and *Douds*, 339 U. S. at pp. 390, 393, 399-400.

3. Doctrinal Recognition that Stigma Imposed by Registration Order is Restraint of First Amendment Rights.

While the Court of Appeals was willing to assume the registration requirement imposed a restraint on First Amendment rights (R. 2088), it then failed to appreciate its true significance (R. 2109-2110). The registration provision here in issue is far from a mere requirement for information or an accounting. Rather, it is a deliberate and intentional use of what appears to be a new governmental weapon, new at least in the United States: Governmental imposition of a public stigma. And certainly the stigma provided by the Act—of involvement in treachery, violence, destruction of all liberty—is a most odious one, undeniably effective to accomplish the intended restraints on peacable expression and association.

This Court has already realistically recognized the legal injury the Government inflicts by imposing a stigma such as here in issue, for its effect is "to cripple the functioning" of the affected organization.[12] Governmental condemnation is a signal for public scorn and an implicit indication of Governmental approval of whatever penalties the public chooses to inflict through private power; and it carries with it a shadowy threat of other possible sanctions by the condemning and puissant Government. The fact that in stigmatizing, the Government causes the injury through a reaction to its act on the part of third persons—that is, through the public's response—does not lessen the Government's responsibility for the injury, or free it

[12] *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 139 (Opinion of Burton, J.); 159, 161 (Opinion of Frankfurter, J.); 186 (Opinion of Jackson, J.).

from the necessity for compliance with constitutional standards.[13]

Nor does the fact that the designation might be true make it any the less an interference with First Amendment rights. See this Court's opinion in *Rumely* v. *United States*, 345 U. S. 41, 44, 48, recognizing implicitly that an exposure by a Congressional committee, though truthful, affects First Amendment rights. The Court of Appeals' *Rumely* decision had spelled out the nature of the interference with First Amendment rights, pointing out that "to publicize or report to the Congress the names of purchasers" of Rumely's literature would have curtailed purchases, because the "realistic effect of public embarrassment is a powerful interference with the free expression of views." 197 F. 2d 166, 174 (C. A. D. C.)[14] The armband worn by government command in Hitler Germany was no less an injury because persons forced to wear it were in fact Jewish, and had theretofore been known as such. As this Court said in *Douds*:

> "Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature" (339 U. S. at p. 402).

It would seem a monstrous constitutional doctrine that the Government could impose a stigma, deliberately for the purpose of, and with the clear effect of, interfering with First Amendment rights, without compliance with the First

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[13] *Ibid*, at p. 141 and cases there cited (Opinion of Burton, J.) 175 (Opinion of Douglas, J.). Compare *Brown* v. *Board of Education*, 347 U. S. 494, where the state interference with Fourteenth Amendment rights was through segregation marking Negro children, to themselves and others, as inferior.

[14] See previous opinion to same effect, *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), cert. den. 334 U. S. 843.

Amendment, and the decisions of this Court do not permit such a result.[15]

B. The restraint imposed on peaceful expression and association by the registration order violates the First Amendment doctrine enunciated in this Court's *De Jonge* decision.

The preceding discussion has shown that the First Amendment right to free association, so important to effectuate the right of expression on political issues,[16] and the right of expression itself, are curtailed and restrained by the Governmental stigmatization of petitioner and its members through the registration requirement. We have further shown that this restraint affects all exercises of the rights of expression and association by petitioner and its members and that it was intended to, and does, especially affect non-revolutionary expression on everyday political issues, and association for the purpose of such expression.

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[15] It is to be noted that a requirement to register in order to exercise First Amendment rights is, even without the imposition of a stigma, a prior restraint upon, and an interference with First Amendment rights. See *Thomas* v. *Collins*, 323 U. S. 516; compare *Schneider* v. *State*, 308 U. S. 147, 164; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 122 (dissenting opinion); *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419, 441; see also *United States* v. *Harriss*, 347 U. S. 612, 625-626. Though here the registration requirement was not explicitly imposed on the right to make a speech or distribute literature, it was imposed on an organization whose chief public function lay in this field, and for the purpose of affecting this function.

See pp. 33-34, *infra*, as to the complete inappositeness here of the *Harriss* holding that the registration provision there at issue, though affecting First Amendment rights, was constitutional.

[16] The right to join organizations is part of the right to assembly protected by the First Amendment. See *Douds*, at p. 400; see also *Garner* v. *Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J. concurring in part). And the right to freedom of assembly is "cognate" to, and "inseparable" from the right to free expression. *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Thomas* v. *Collins*, 325 U. S. 516, 530-531.

For the Government to so burden the freedom to associate and express opinions, though the opinions do not in themselves create a danger, is a direct contradiction of the fundamental First Amendment principle expressed in *DeJonge* v. *Oregon*, 299 U. S. 353, 362:

> "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." [17]

Thus, this Court's unanimous opinion by Chief Justice Hughes emphasized that the salient consideration in the exchange of opinion and in the Government's power to restrict it, is *what* is said, not who says it. Restraint of speech must be based on its content rather than its source, on the character of the idea, rather than the speaker. In direct contradiction, the rationale of the registration provision at bar is to diminish the right of expression and association of a Communist regardless of his subject, and in particular to negate his freedom of expression through discouraging consideration or even a hearing of his opinions.

This subversion of the *DeJonge* doctrine has large significance, because it means a rejection of our basic tenet that truth can be sifted from error by the "power of reason as applied through public discussion." [18] "(T)he basis

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[17] The holding was that DeJonge could not constitutionally be held guilty of a crime merely because he assisted (through making a speech) at a meeting held under the auspices of the Communist Party. The question of whether criminal syndicalism had been advocated at the meeting had been ruled to be outside the issues of the case by the state courts. In speaking of the relevance of the "purpose" of the meeting, the Court was not referring to its possible hidden purpose, but to the content of the particular meeting: whether it involved the advocacy of syndicalism, or merely of peaceful political methods.

[18] *Whitney* v. *California*, 274 U. S. 357, 375, Brandeis, J. dissenting.

of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policy."[19] This Act expresses no confidence in the free exchange and free scrutiny of ideas as the way to truth. On the contrary, the draftsmen here assumed that exposure to error is likely to be fatal to the discovery of truth; they assumed that the "power of reason" was not sufficient to determine the merit of ideas, and that the American public cannot, without Government identification of the false prophets, determine whether ideas are false or true. This Act assigns to the Government, not to the individual's power of reason, the function of protecting the people from being misled.

Recent experience has shown the prescience of this Court in emphasizing the indispensability of the *DeJonge* doctrine for the preservation of free exchange of opinion. Thus, the focus by Congressional investigating committees on the sole question of whether the person expressing an idea is or was a Communist, has lead to abandonment of evaluation of the merit of ideas and instead to considering only whether they are evidence of Communist sympathy.[20] There is a consequent fear, recognized even by our more conservative observers,[21] to express or respond to any idea, regard-

[19] *Dennis*, 341 U. S. at p. 503.

[20] See, i.e., Senate Report No. 2050, entitled Report on Institute of Pacific Relations, submitted by Committee on the Judiciary (82nd Cong., 2nd Sess.) esp. pp. 192-217, dealing with Owen Lattimore; Hearings of House Committee on Un-American Activities, July 21, 1953, on Bishop G. Bromley Oxnam, printed in U. S. News and World Report for August 7, 1953, pp. 40-48, 100-142.

[21] See letter from former United States diplomatic officials, stating that fear of ideas "is playing an important part in American life," N. Y. Times, Jan. 17, 1954, sec. IV, p. 8E, col. 7; and see Secretary of State Dulles' reference to the authors of the letter as "a distinguished group of former diplomats whom I highly respect.", N. Y. Times, Jan. 20, 1954, p. 9, col. 1; and see Oakes, *This the Real, the Lasting Damage*, New York Times Magazine, March 7, 1954, p. 9.

less of its merits, that may be regarded as evidence of Communist sympathy. Only "100% Americanism" seems safe. For, when the Government assumes the new role of telling the citizenry whom to distrust, as it does by the instant registration provision, it undermines the citizen's self-reliance and intellectual courage to determine whom he should trust as well. As in the establishment of any system of censorship, there is a "pervasive" effect upon the whole institution of free thought, and independent individual determination of whom and what is to be credited or discredited.[22]

Thus, as indicated in *DeJonge*, the Government can, without ostensibly condemning one set of ideas and approving another, accomplish this same constitutionally forbidden result by merely condemning and stigmatizing the proponents of a disapproved viewpoint. By restraining expression on the basis of *who* rather than *what*, the Government extends its power to repress past its Constitutionally permissible scope, and can effectually restrain the expression of views other than those that "transcend" Constitutional limits (see *DeJonge* quotation, *supra*).

Certainly, knowledge of whether a person is a Communist, or of his various motivations, biases, and preconceptions may be valuable in appraising the validity of his ideas, and the benefit of associating with him. But in a democracy, the function of obtaining or using this knowl-

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[22] See *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98, as to the "pervasive * * * restraint on the freedom of discussion imposed by the threat of censorship."

The pervasive effect of the registration requirement was indicated by Seth W. Richardson, first chairman of the SACB. In praise of the Act, he said that as a result of its passage and even before the Board issued any orders, he thought "individuals will have a tendency to shy away from joining organizations that *might* be subversive for fear of having to own up to such affiliations by signing the Justice Department register." U. S. News and World Report for November 3, 1950, p. 33 (italics added).

edge cannot be transferred from the hands of the citizen to the Government. As Mr. Justice Jackson said in a succinct statement of democratic faith: "It is not the function of our Government to keep the citizen from falling into error."[23] Absent circumstances of extraordinary danger, which we shall show do not here exist (*infra*, pp. 36-40), the citizen is to rely upon the exercise of his own reason and the exchange and clash of ideas in the marketplace, for his protection against the false and misleading. The Government cannot take on the function of directing him in the realm of ideas and associations; it cannot impede peacable expression and association on the basis of its source by imposition of a stigma, as was here attempted.

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Denial of tax exemption to the petitioner and of deductibility for income tax purposes of contributions to it; prohibition of Government or defense facility employment or the issuance of a passport for a member; and special provisions with respect to alien members, also come into play as a direct result of the registration order (§§ 11, 5, 6, 22-25; see Court of Appeals' Opinion, R. 2083, 2109). These provisions involve other constitutional doctrines and factual considerations in addition to those of concern in this brief. However, from the perspective of the First Amendment and as attachments to the registration requirement which has the primary purpose and effect of interfering with peaceful political expression and association by and through the Communist Party (*supra*, pp. 14-18), these provisions must be viewed as increasing the interference with First Amendment rights effected through the stigma of registration as a "Communist-action organization". These ancillary provisions help cripple the organization in all its operations, including and in particular its public peaceful political phase; set up powerful deterrents to membership

[23] *Douds*, 339 U. S. at p. 942 (Jackson, J., concurring and dissenting, each in part).

for any purpose, including the purpose of peaceful political expression; and discourage any contact with the organization or its views, including those on everyday political questions, because the drastic penalties on membership would cause people to avoid any possibility of suspicion of membership.

C. The requirement of Section 10 for the labeling of publications and broadcasts also restrains freedom of expression in a manner contrary to the *DeJonge* doctrine.

Under § 10 of the Act a direct and immediate consequence of the registration order is that petitioner must label all publications and their wrappers as well as precede all radio or television broadcasts with the notice that they are "disseminated" or "sponsored by ....., a Communist organization." Like the registration requirement itself, the purpose and effect of this provision is to restrict the petitioner's right, and the right of petitioner's members through the organization, to address the public on the political issues which, as we have pointed out, are the customary subjects of its public expressions. Again, as by the registration requirement itself, the Government is interfering with the right of petitioner and its members to an audience on non-revolutionary political topics through the technique of attaching a public stigma to their expressions of opinion. For, the label and announcement required by section 10 reflect and epitomize the findings of the SACB as to the opprobrious character of the organization and its connection with the world Communist movement, described in highly condemnatory terms in section 2 of the Act.

To reinforce the purpose that the literature and broadcasts not only should be discredited but should be completely shunned, the *wrapper* of the publication is to bear the opprobrious label and the announcement is to *precede* the broadcast. This device would tend to produce returns

of the mail unopened, in an attempt—perhaps futile—to avoid the contagion of the stigma.[24]

The labeling and announcement requirement is a graphic effectuation of the rationale of the registration provision itself: that the Government should avert and prevent the people's exposure, or at the very least response, to what the Government has determined is likely to be misleading in the realm of political ideas. Section 10 is again a flagrant contradiction of the *DeJonge* principle that the right to express opinions freely—necessarily including the right to wage an independent fight in the marketplace for an audience—can be restricted, so far as the Government is concerned, only on the basis of what is said and not on the basis of who says it. We have already discussed the general importance of the *DeJonge* principle to the preservation of free exchange and free scrutiny of ideas. And it is apparent that the particular effect of the stigmatizing device provided in Section 10 would be that the opinions expressed in labeled literature or broadcasts would take on the stigma of the organization, with the result that non-Communists would not feel free to express those or similar opinions, nor would these Governmentally stigmatized ideas be evaluated on their merits by the public, regardless of who expressed them. When it is borne in mind that many of the views expressed by the Communist Party on current issues could honestly commend themselves to non-Communists on entirely different basic premises from those motivating the Communists, it is apparent that the restraint resulting from Section 10 on the freedom of non-Communists to express and consider ideas would cover broad areas of political thought.

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[24] Thus, the labeling requirement not only operates as, but resembles in form, a prior restraint on expression. Cf. *Donaldson* v. *Read*, 333 U. S. 278.

It is apparent that the instant requirement of an opprobrious identification, deliberately required *before* the communication of opinion, is different in its effect on free expression from a general system for simple factual identification of authors or sponsors. See further comparison of instant measure with other types of registration and identification measures, *infra*, pp. 31-33.

D. The registration order, with the resulting stigma, deprivations, and penalties, was based largely on the expression of non-revolutionary political opinions, and restrains the expression of such opinions.

"One of the chief items of evidence in the case", according to the Court of Appeals (R. 2148), establishing that petitioner is a "Communist-action organization", is the evidence on which the Board relied under § 13(e)(2) respecting "the extent to which its [petitioner's] views and policies do not deviate from those of such foreign government [the Soviet Union] * * *." This evidence, which was according to the Court's own statement a major cause for the imposition of the stigma and penalties of the Act, consisted of the Party's non-revolutionary political opinions on the issues of the day. Thus, the Court catalogued as important subjects on which the Party had expressed its views "the Truman doctrine; the Marshall Plan, ECA, the North Atlantic Pact, control and inspection of atomic energy, the seating of Yugoslavia in the United Nations Security Council, the representation of China in the United Nations, the peace treaty with Japan, the William Oatis case, and the Korean War" (R. 2145). The Court also cited the Party's changing views as to World War II and the post-war Eastern European governments; "the blockade of Berlin in 1948"; and "of current significance" its views on Korea including the view "that the Syngman Rhee government is a reactionary 'puppet regime'" (R. 2146).

Not only were political viewpoints thus treated as a basis for imposition of penalties, but, of great significance to free expression, the Board and in turn the Court held that under § 13 they were to consider, and in fact did consider as a "chief" item of evidence, *mere coincidence* of petitioner's views on these political issues with those of the Soviet Union. It was not necessary, they held, to consider the origin of each position, with respect to who proposed it or how it was adopted; indeed, it was not deemed relevant under the statute even whether the cited views of

the Party were adopted before or after their endorsement by the Soviet Union (SACB Report, R. 81-86;[25] Court's Opinion, R. 2146). Finally, the Court held any degree of coincidence of views with the Soviet Union can be given weight under the statute (R. 2122).

The fact that *any* degree of coincidence of views with Russia's can be treated as significant is apparent on the face of the statute; but this wide-open criterion assumes major importance from the standpoint of free expression because of the interpretation herein that *mere coincidence* of views with the Soviet Union is the factor to which the statute refers. Even if this were a statute requiring a showing that each coincidence of view originated in Russian policy, expression of coinciding views by non-Communists as well as Communists would be restrained; because of the natural apprehension that the subtle question of motive might be mistakenly appraised.[26] But the instant Act as here interpreted and applied is much more blatant; there are no subtleties here. Coincidence of view, without any regard to origin or even chronology, and even though incomplete and partial, can be a major factor in evoking the stigma and penalties of the Act.

Not only is mere coincidence of views with Russia's treated as "one of the chief items of evidence" in upholding the instant order. Further, the Party's non-revolutionary views on international questions are highlighted in the total picture of petitioner's current program. For this aspect of its activities was established by direct evidence, rather than depending in any part on inference from the past or from general concepts and relations, and it relates to immediate rather than ultimate aims (see Court of Appeals' Opinion, indicating the degree of inference involved in

[25] The SACB Report in some instances mentions that Russia's view on an issue was adopted prior to the Party's similar view, but on many issues gives no consideration to this question.

[26] *Douds*, 339 U. S. at p. 437 (Jackson, J., concurring and dissenting, each in part).

other items of proof, and the ultimate character of other goals, R. 2138-2143, 2147, 2148-2152). Thus, in any organization's practical consideration of how to conduct its current operations in order to avert the stigma and penalties of the Act, it would necessarily regard avoidance of expression of views similar to Russia's as highly important.

Besides limiting freedom of expression by organizations, and by individuals through their organizations, equally or more the instant order also discourages independent individual expression of views similar to those that are or may be voiced by Russia, no matter how honestly held. For under the Act a person's support of any of petitioner's viewpoints is evidence of his membership in petitioner;[27] and with the emphasis in the instant case on petitioner's views on international questions, and on the mere coincidence thereof with Russia's, the potential importance of this type of opinion in the determination of membership is augmented. Thus, to avoid the serious deprivations and penalties the Act imposes on members, individuals would be under a constraint to forego expression of views similar to petitioner's or Russia's on all international issues.

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[27] Section 5 of the Communist Control Act of 1954 (68 Stat. 775, 50 U. S. C. 481) provides in part: "In determining membership or participation in the Communist Party * * * the jury * * * shall consider evidence * * * as to whether the accused person * * * (11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to * * * anyone * * * in behalf of the objectives of the organization; (12) Has indicated by word * * * writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; (13) Has in any other way participated in the * * * objectives or purposes of the organization * * *."

These criteria of membership are applicable in prosecutions under § 15(c) of the instant Act, which provides for a maximum of a $10,000 fine and imprisonment for not more than 5 years for individuals violating §§ 5, 6, or 10. No administrative finding or order that an individual is a member is prerequisite as a preliminary to such a prosecution. See Court of Appeals' discussion of procedure for imposition of sanctions and penalties on members, R. 2106-2107, particularly note 48.

The instant Act, as here interpreted, is the first legislative enactment in which coincidence of views on international questions with Russia's has been made a basis for stigma, penalty, and deprivation. Many of these views—on Korea, atomic control, war—are not uniquely the product of Communism, and might be regarded as meritorious on non-Communist premises. Thus, it is impossible to treat views coinciding with Russia's as forbidden territory, and still maintain for non-Communists a free examination of ideas. The restraint extended by this Act therefore impedes the ascertainment of truth on the crucial international issues of our time. As Zechariah Chafee pointed out, these crucial issues "cannot be wisely decided unless individuals and opinion-forming organizations on one side are left as free to present their views as those on the other side." [28]

In operating as a restraint on the expression of views that are similar to those that are or might be expressed by the Soviet Union, the instant order obliterates "the First Amendment's command that the opportunities for free public discussion be maintained." *Douds*, at p. 400.

E. The instant registration requirement is, from the standpoint of free expression, wholly distinguishable from registration devices heretofore used.

The Court of Appeals, paying scant attention to the unique characteristics of the instant registration requirement, noted that registration was also required of "lobbyists * and foreign agents,** and even of doctors, lawyers, restaurants and barbers, who are required to register and obtain licenses" (R. 2109-2110). While the latter occupa-

[28] Chafee, *The Free and the Brave* (published by American Civil Liberties Union, 1950), p. 33.

* "60 Stat. 841 (1946), 2 U. S. C. A. § 267. See United States v. Harriss, 347 U. S. 612, 98 L. Ed. ___, 74 S. Ct. 808 (1954)." (Footnote by the Court, numbered in opinion 55.)

** "52 Stat. 632 (1938), as amended, 22 U. S. C. A. § 612." (Footnote by the Court, numbered in opinion 56.)

tional registration and licensing requirements are wholly dissimilar in rationale and effect from the instant one, we recognize that the required registrations of lobbyists and foreign agents are to some degree analogous in that they too relate to the communication of opinion. Amicus submits, however, that those measures do not restrain free expression to any extent comparable with the instant registration; indeed, amicus has not opposed the statutes requiring registration of lobbyists and foreign agents.

The great distinction between all previous registration requirements and the instant one lies in the fact that under this Act the Government stamps particular groups and persons with such a mark of opprobrium, odium, and danger to the State, that opinion emanating from them would be universally despised and shunned. Under the lobbyists' and foreign agents' acts, on the other hand, representatives of the most reputable groups and most esteemed foreign powers must register along with those of the ill-reputed. It is true that if the disclosure required by these acts would identify the registrant in an unpopular role, he might refrain from his intended propaganda activities in order to avoid registration; or if he did register, the disclosure might greatly diminish the influence of his expressions of opinion on some of the public. But the stigma, if any, would arise from the circumstances, not from deliberate Governmental selection and designation. And the odium attaching to a registrant under those acts could hardly compare with that arising from the instant order, for the very reason that those registration systems did not include a procedure for findings by which the Government would deliberately set about creating a stigma. One need only compare the fear and complete rejection that would be likely to greet receipt in the mail of a publication displaying that it was "disseminated by the Communist Party, a Communist organization", with the response under ordinary circumstances to mail that merely showed it was sent by a person registered as an agent of a foreign government.

It is the governmentally-imposed stigma, not registration as such, which is the root of the violation of the First Amendment in the instant case. It is through the stigma, not through registration as such, that the instant registration requirement throws a restraint over freedom of expression and contradicts the *DeJonge* doctrine that there must be a free circulation of ideas regardless of source, so long as they do not transcend Constitutional limits. The effect of registration as a lobbyist or foreign agent is, in general, to leave the communication of their opinions unimpaired, and merely add a knowledge of the source of the opinions to aid in their evaluation. The instant act, however, stands for the proposition that the Government can, by fastening a severely maiming and ostracising stigma on a group of persons engaged in political propaganda, effectively close the market place of opinion to the expression of their views.

From the standpoint of the effect on free expression, it is also important that none of the previous registration requirements were imposed on the basis of, and thereby restrained, the expression of political viewpoints, which was a major basis of the instant order (supra, pp. 28-31).[29]

The lobbyist registration act is also significantly distinguishable from the instant one on the very basis on which this Court upheld it in *Harriss*. That Act, this Court held, was directed to a legitimate concern of Congressmen in their representative function: determination of whether appeals addressed to them reflect actual public sentiment or are artificially stimulated (347 U. S. at p. 625). Thus, the lobbyist registration is addressed to informing a limited group, Congressmen, in a special situation where it is consistent with the First Amendment for the Government to

[29] Thus, those who are required to register under the lobbying act are defined in specific and objective terms as those who "solicited, collected, or received" contributions, with a major purpose of influencing legislation, "through direct communication with members of Congress." *United States* v. *Harriss*, 347 U. S. 612, 623.

concern itself with the source of opinion rather than merely its content.[30]

The registrations required by such statutes as those administered by the Securities and Exchange Commission are again in a class apart, somewhat like the registration of restaurants and barbers cited by the Court of Appeals. Those disclosures relate to the sale of commodities; they do not affect trade in political ideas. Labeling under those statutes is analogous to that under the Pure Food and Drug Act, but the Government is here asserting the power to attach invidious labels in the field of political expression.

F. The restraints imposed on First Amendment freedoms by the registration order are not constitutionally justified as a means of averting danger to the state.

We have demonstrated the extensive restraint the registration order imposes on the expression of everyday non-revolutionary political opinions, and on association for the purpose of such expression through (1) the stigma the order spreads over all expression or association by the Communist Party and its members (supra, pp. 15-21); (2) the specific deprivations imposed on Party members as a consequence of the order, which increase the cost of expression through, or association with, the Party (supra, pp. 25-26); (3) the particular stigma imposed on the Party's broadcasts and publications, notwithstanding their non-violent political content (supra, pp. 26-28); and (4) issuance of the order in large part on the basis of the Party's expression of non-revolutionary political opinions similar to those expressed by Russia (supra, pp. 28-30). We have also demonstrated that the restraint imposed by the

[30] Neither this Court nor the Courts of Appeals had occasion to consider the constitutionality of the foreign agents' registration act. In *Viereck* v. *United States*, 318 U. S. 236, the agent had registered and the Court only considered what the statute intended the registration statement to cover. This Court held that the act only applied to propaganda the agent was shown to have put out directly on behalf of his foreign principal, rather than all the propaganda he disseminated.

registration requirement on the First Amendment rights of peaceful expression and association was deliberate and purposeful, and that its repercussions extend far beyond the petitioner, its members, and those who might want to become associated with petitioner. For, in addition to its effect on these groups, this unprecedented attack on expression and association, based on its source rather than its content, tends to change the whole perspective of the American people towards the free exchange of opinion.

It is apparent that the purported justification for this unprecedented restraint on peaceful expression and association requires close judicial scrutiny. To restrain innocent expression as part of an attack on culpable, has never been countenanced under the First Amendment; a ban on expression must be limited to the dangerous matter. See *Donaldson* v. *Read*, 333 U. S. 178.[31] Even outside the pivotal First Amendment area, the Government cannot restrain the innocent along with the dangerous, except in time of extreme national emergency when the peril is great and is so imminent that it is reasonable to think there is no feasible alternative method of averting it. See and compare *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; and *Ex Parte Endo*, 323 U. S. 283.

Thus, we submit that the serious import of the instant order cannot be exaggerated. Its validation would create an entirely new precedent drastically diminishing the security of our Constitutional right to peaceful political expression and organization. If the total right could be suppressed merely because one phase of a person's or organi-

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[31] "Having concluded that the original order was broader than necessary to reach the fraud proved, the Postmaster General not only possessed the power but had the duty to reduce its scope to what was essential for that purpose." 333 U. S. at p. 184. See further exposition of this principle in *Sunshine Book Co.* v. *Summerfield*, 221 F. 2d 42 (C. A. D. C.), cert. den. 349 U. S. 921. See also *Winters* v. *New York*, 333 U. S. 507, 509, 512; *Saia* v. *New York*, 334 U. S. 558, 562, 564.

zation's activity was found to be dangerous, there would be an elastic, easily available, and generally applicable weapon for cutting off the political expression and association which is the most significant aspect of the First Amendment.[32] And besides its repugnance to First Amendment principles, this Act's treatment of petitioner and its members as evil for all purposes, strikes one as repugnant to the general philosophy we are trying to preserve. For, stamping any group of people as pariahs, hemming in their freedom in all their expressions and activities, violates the fundamental pattern of a government of toleration, of restricted rather than totalitarian power, that enacts only those restrictions necessary to deal with perceptible dangers, and otherwise respects the rights of all within its jurisdiction.

What is the danger which is alleged to warrant an Act and order so contradictory of our basic principles of Government?

1. Relation of order to danger of Government's overthrow, espionage or sabotage.

Section 2 of the Act, stating the "necessity for legislation," states the danger as the establishment of "a Communist totalitarian dictatorship in the countries throughout the world * * * by * * * the overthrow of existing governments" (§ 2(1), (6)). The legislative declaration conceives, correctly, of overthrow as the antithesis of peaceful persuasion, referring to the fact that the world Communist movement promotes the objective of overthrow "by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system * * *" (2(6)). Section 2 also refers to the danger of "clever and ruthless espionage and sabotage tactics" (2(11)). The

[32] Freedom of political expression and association is synonymous with our very form of government and is the most vital aspect of First Amendment freedom: *Winters* v. *New York*, 333 U. S. 507, 517, 518; *Stromberg* v. *California*, 283 U. S. 359, 369.

Court of Appeals, in upholding the Act and the order, conceived of the major justifying danger as an effort to overthrow the Government (R. 2121). What is the relation between these dangers and the restraint imposed by the registration provision which was intended to affect, and does primarily affect the right of expression and association for peaceful political purposes in and with the Communist Party and the rights of Communists to express themselves on ordinary social and political questions? How does the purported danger of overthrow, sabotage, or espionage necessitate the restraint of expression on issues unrelated to dictatorship, overthrow, sabotage or espionage? How is the petitioner's use of the normal "democratic processes" referred to approvingly in the Act, a danger?

It is apparent that the purported Congressional justification for restraining peaceful expression and association as a means of preventing overthrow, sabotage, and espionage, is the possibility that through such expression and association for peaceful political purposes the Party will lead people eventually to engage in these subversive acts. Thus, this measure does not restrain incitement to violence, nor is it even advocacy of violence that is being restrained. Rather, this Act restrains expression much further back on the continuity leading to the possibility of violence. It cuts off expression and association that merely *may* lead to endorsement of violence which in turn *may* lead to action, —an area of expression so far removed from action that it has heretofore been deemed entitled to absolute protection. See *Taylor* v. *Mississippi*, 319 U. S. 583, 589, 590; *Stromberg* v. *California*, 283 U. S. 359, 369. Thus, again, the basic rationale of this Act is revealed: its rejection of the value of individual reason and the play of opinion as salutary forces for distinguishing truth from error.[33] Yet it is our constitutional faith that by these forces people

[33] See, supra, pp. 22-23.

can, and for the most part will, protect themselves from being misled into disloyal concepts and activities.[34]

We submit that this unprecedented reaching back into the area of peaceful expression and association, interfering broadly and deeply with First Amendment rights would be permissible only if the Government could show a danger of violence, espionage, or sabotage so great and threatening that ordinary measures could not be trusted and usual respect for First Amendment rights could not be accorded. No such threat has been shown, nor has there been any demonstration that narrower and more direct means, operating nearer the point of danger, are inadequate.[35] Indeed, that more direct means, less injurious to First Amendment principles, are in use is known to this Court. See *Dennis* v. *United States*, 341 U. S. 494, and pp. 581-582 (Douglas J. dissenting). No need has been shown for cutting down peaceful expression and association for all, in order to meet the threat of violence from a few.

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[34] Even in the case of those who are attracted sufficiently by the Party's expression of peaceful political sentiments actually to become Party members, it is clear, not only in theory but in fact that there is no inevitability about their acceptance of disloyalty. It is common knowledge, supplied in the main by many witnesses before Congressional committees in recent years, that persons attracted by the peaceable objectives of the Communist Party frequently broke with it when an attempt was made to lead them to other Party aims. See i.e., testimony of Robert Gorham Davis, Daniel J. Boorstin, and Granville Hicks, Hearings before the House Committee on Un-American Activities (83rd Cong., 1st Sess.) [Communist Methods of Infiltration (Education)], pp. 5, 59, 107-108.

[35] Particularly when a prior restraint on expression is involved, "the state has a heavy burden to demonstrate" that it is justified by "exceptional" circumstances. And in any First Amendment case, it is only a "narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society". *Burstyn* v. *Wilson*, 343 U. S. 495, 504. As to the Government's burden to demonstrate the justification for a measure restraining expression and as to the Constitutional requirement that the restraint must be narrowly drawn, see also *Kovacs* v. *Cooper*, 336 U. S. 77, 88; *Thomas* v. *Collins*, 323 U. S. 516, 530; *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Schneider* v. *State*, 308 U. S. 147, 161, 162; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4.

This Court's decision in *Dennis*, cited by the Court of Appeals (R. 2089), does not support the validity of the instant provision and order. There the measure only applied to the advocacy of force and violence; not only was it more directly related to the purported danger, but, in consequence its effect on First Amendment freedoms was far less, nor did it contradict the fundamental First Amendment precept expounded in *DeJonge*. Still less is the *Douds* decision, also cited by the Court of Appeals (R. 2091), apposite. There again the measure was a relatively narrow one tailored to directly counter a specific danger of injurious acts.

Thus, assuming the dangers stated in § 2 of the Act exist,[36] and even assuming the voluminous findings of the Board are true, the registration requirement is not a rational and justifiable remedy for these dangers in the light of the First Amendment. The reams of paper that have been filled in making this order and the methodical procedure that has been maintained, are no substitute for appreciation and preservation of the principles of freedom.

2. Danger of Foreign Political Control of Our Government.

Aside from the danger of overthrow of the government, the Court of Appeals also seemed to find justification for the Act in the evil of foreign control or interference in our

[36] While we can assume, for the purposes of our argument, the validity of the findings of § 2, we would like to note our disagreement with the view of the Court below on the status of these findings. When this Court indicated in *Galvan* v. *Press* that the Congressional findings were valid because they were not "baseless", we submit it did not mean they were valid simply because based on "extensive investigation", as the Court below assumed. (See 347 U. S. 522, 529; opinion of Court below, R. 2132.) Rather we believe this Court meant they were not "baseless" in the sense that they had factual support. And it is to be noted that in *Galvan* this Court was applying the most minimal standard of judicial review, for it was there considering the validity of a classification of aliens for deportability, with respect to which Congress has an extraordinary measure of discretion. See *Galvan*, 347 U. S. at pp. 530-531.

government, regardless of the element of violence (R. 2085-2087). Certainly we would not quarrel with the Court's premise that foreign control of our political life is an evil with which Congress may deal. But we most emphatically quarrel with the Court's complete failure to consider how substantial a danger of "foreign control of our governmental affairs" (R. 2086) the petitioner presents.

In *Dennis*, this Court justified its disregard of the paucity of strength and influence of the Communist Party on the ground that an attempt at overthrow of the government is a danger regardless of the number involved or its certainty of failure, because of the damage the mere attempt could cause (341 U. S. at p. 509). Here, however, where the issue discussed by the Court of Appeals is the exercise of political control by the Party, the extent of its political strength and influence is obviously a most salient consideration.

Particularly in the light of the strong anti-Russian spirit apparent in this country in recent years, it is most difficult to suppose there is any danger petitioner will grow so large, or its views become so influential, that through it the Soviet Union can threaten to control or interfere with "our governmental affairs." And absent such a danger of control or interference, it is contrary to First Amendment fundamentals for this Government to attempt to prevent the expression of political opinion even though it may be formulated because of sympathy for a foreign power. A misleading or evil political influence in itself does not create a danger which is subject to Governmental suppression.

We submit that the now-popular viewpoint [37] that it is the Government's function to deal with any Communist-slanted influence on public opinion is contrary to the First Amendment. As long as the expression of pro-Communist

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[37] See, i.e., statements of Congressmen during hearings on Bishop Oxnam, cited *supra*, note 20, indicating that it was appropriate to investigate Communist influence among clergymen though it was recognized to be minimal.

or of any misleading opinion, is of such meager proportions that the free play of opinion can discount and counteract it, it must be left to the battle of the marketplace. It hardly needs our statement that in this principle is the barrier to the State-directed monolithic opinion of a totalitarian state.

G. The statutory provision for registration of "Communist-action organizations" is unconstitutional for similar reasons to those invalidating the order against petitioner.

The arguments we have herein made to show that the registration order issued against petitioner is unconstitutional under the First Amendment, apply either wholly or with slight modification to show the unconstitutionality of the registration provision itself. Our arguments as to the intentional restraint on peaceful expression and association through the imposition of a stigma; the intensification of the restraint by the other deprivations consequent on a registration order; the gravity of the interference with First Amendment rights from the standpoint of the *De-Jonge* doctrine; and the lack of justification for this restraint and curtailment of First Amendment rights, all go to the unconstitutionality of the statutory provision for registration, as well as the invalidity of the instant order. While conceivably an order could be issued under the instant Act without the great reliance herein put on the expression of peaceful political opinions similar to Russia's, the statutory provision allowing consideration of such opinions, particularly with its interpretation herein, stands as a continuing threat and restraint on the expression of such opinions. Accordingly, the section of our argument dealing with reliance by the SACB and the Court below on mere coincidence of views with Russia's, also substantially applies to the question of statutory validity.

Thus, we submit that the provision for registration of "Communist-action organizations" and all the provisions of the instant Act dependent thereon, are unconstitutional under the First Amendment.

CONCLUSION

The judgment below should be reversed; the registration order should be held unconstitutional; and the Act's provision for registration of "Communist-action organizations", together with all provisions dependent thereon, should likewise be held unconstitutional.

Respectfully submitted,

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